CASE NO.: CC 13/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

ALBIUS MOTO LISELI **ACCUSED**

CORAM: **TOMMASI J**

Heard on: 02, 03 & 10.04.2012

Delivered on: 24.09.2012

JUDGEMENT - TRIAL-WITHIN-A-TRIAL

TOMMASI J: [1] The accused has been indicted with several counts inter alia High Treason. Counsel for State wanted to introduce evidence of extra curial admissions, pointing out and a confession by the accused. The accused objected to the admissibility of this evidence and a trial-within-a-trial was held to determine the admissibility of the evidence.

[2] The grounds for objection raised by the accused were as follow:

- The accused was not informed fully of his right to legal representation at the time of his arrest and during the currency of his interrogation;
- The accused was not informed of his right not to incriminate himself;

[3] The legal framework and general principles applicable to the admissibility of admissions and confessions has been fully dealt with in S v MALUMO AND OTHERS 2010 (1) NR 35 (HC) in paragraphs [1] – [20] and there is no need for this Court to repeat what was stated therein.

[4] Oral statement made to Inspector Shinana: Inspector Shinana testified that he had a consultation with the accused and his family on 5 January 2009. He wanted to know from them whether he could help them. The family informed him that the accused had been living in Zambia during 2003. He hereafter proceeded to interview the accused. It was during this interview that the accused made certain admissions.

[5] Inspector Shinana testified that when the family informed him that the accused had lived in Zambia during 2003 he suspected that the accused had illegally left the country and lived in Zambia illegally. He testified that the police officers normally "clear people who were living in other countries, whether legal or illegal when they are coming back home."

[6] It was common cause that, at the time in question, a lot of Namibians from the Caprivi district left the country and were residing in neighboring countries. From the wording used it appears that the police had to "*clear*" persons to determine whether they were residing in the neighboring countries legally. It was not entirely clear what he meant by stating that he suspected the accused of having lived in Zambia illegally. It is not an offence for Namibians to live in other countries. It could either mean that he suspected the accused of having left Namibia in contravention of the provisions of the immigration laws of Namibia or that he suspected the accused of having committed treason. Suffice it to say that Inspector Shinana admitted that he suspected the accused of having committed an offence after he received information that the accused was living in Zambia during 2003 and before he interviewed the accused. It was

common cause that he did not inform the accused at any stage during or after the interview of his right to legal representation and his right to remain silent.

[7] In *S v Malumo and Others*[1] it was held that a suspect should not be in a worse position than an accused that has been arrested and that he should be warned in terms of the Judges Rules; should be informed of his right not to incriminate himself; and his right to legal representation.

[8] Mr Hengari submitted in argument that the testimony of Inspector Shinana was of no consequence since it was based on hearsay evidence received from the family of the accused. It is of little importance what he heard. What is of importance however is whether he was aware that the accused was a suspect and if so whether he cautioned the accused in accordance with the Judges Rules and explained his rights in terms of article 12 of the constitution to the accused.

[9] Mr Shileka, appearing for the State submitted that this Court has discretion to admit the testimony of this witness since: he had been bona fide unaware that the accused was a suspect when he asked him for an explanation; and no pressure or influence had accordingly been exercised on the accused to impart information. He referred the Court to *S v Kamudulunge*[2] in this regard. I am in agreement with the dictum of my brother Liebenberg J in *S v Kamudulunge*, *supra.*

[10] There was no evidence that the accused was forced by either his family or Inspector Shinana and I therefore conclude that whatever statement he made to Inspector Shinana was done voluntarily. The dispute was whether the accused was warned in accordance with the Judge's Rules and informed of his constitutional rights not to incriminate himself and his right to be legally represented.

[11] The facts of the case referred to by the State and the facts herein may be distinguished. In *S v Kamudulunge, supra,* the accused entered the charge office, went behind the counter where he threw down a box of matches on the desk before sitting down. The Court found that "besides the accused's akward behavior upon his arrival at the

[1](2) 2007 (1) NR 198 (HC)
[2] Case no: CC20/2010, unreported, delivered on 26 October 2011.

police station, it could not have been expected by the police officer, on a question what he was looking for, that the accused would make self-incriminating statements; and the moment he did, he was stopped and his his rights, inter alia, to remain silent, explained to him" In *S v Van der Merwe*[3] the Court found that the investigating officer had not realised that he was talking to a possible suspect. Inspector Shinana suspected the accused of having "lived" illegally in Zambia during 2003 after the family informed him of this fact and before the accused made a statement to him. It was at this point that he should have cautioned the accused and failed to do so. He did therefore not have a bona fide belief that the accused was not a suspect. Under these circumstances the accused's constitutional rights in terms of article 12 were infringed and I rule that the statement made to Inspector Shinana inadmissible.

[12] The warning statement: Detective Warrant Officer Kambungu, a member of the High Treason and Counter Terrorism Unit, testified that he formally charged the accused on 7 January 2009. He had used a pro forma form referred to as a Pol 17 for this purpose. He testified that he completed the first few pages containing the general information of the accused. When he started putting questions on the forth page of the form, the accused informed him that he did not understand him very well and requested that the services of an interpreter. He then recorded this on the warning statement as follow:

> "*Interview suspended by 17:50 as the suspect is not hearing English very good (sic) and requested the service (sic) of an interpreter, thus the interview will continue on 2009.01.09 at Ngoma Police Station, board room A20."*

[13] Very little weight can be attach to this warning and explanation of the accused rights on this occasion given the fact that the he did not fully understand what was explained to him. It is however of some importance that when the accused was asked whether he needed a legal representative at that stage, he indicated that he would need legal representation at a later stage. When Warrant Officer Kombungu was cross-

[3] 1998 (1) SACR 194 (OPD)

examined as to why he did not clarify with the accused what he meant by "*at a later stage*" he indicated that there is no provision made in the pro forma form for additional questions and that he does not have the right to amend or alter it.

[14] Warrant Officer Kombungu confirmed that the accused, when he appeared in the district court on 8 January 2009 for the first time, was informed by the magistrate of the seriousness of the offence he was charged with and was encouraged to apply for legal aid. The accused was persuaded to apply for legal aid and he was then assisted to complete the application forms on this date.

[15] On 23 January 2009 Warrant Officer Kombungu returned to Ngoma Police Station in order to record the warning statement of the accused. Inspector Simasiku, as the interpreter and Constable Silishebo whose function was to secure the safety of the persons, were also present. All three officers were employed in the High Treason and Counter Terrorism Unit at the time.

[16] On this occasion the same pro forma form was used. The accused was informed that he is not obliged to answer any question put to him or to make any statement but warned that what he would choose to say would be taken down in writing and it may be used against him at a later date as evidence in a court of law.

[17] The accused was further informed that he has a right to consult a legal practitioner of his own choice and at his own cost prior to deciding whether he should remain silent or answer questions or give an explanation; and to have the legal representative assist him when answering questions or when giving an explanation or point out any object or place. Both Warrant Officer Kombungu and Inspector Simasiku testified that the accused was informed that he could apply for legal aid although this was not evident ex facie the pro forma warning statement they had used at time. Inspector Simasiku testified that he explained the right to legal aid in very simple terms as the accused was not a well educated person. The accused confirmed that he understood what was explained to him. The following question and answer was recorded:

"Question: Do you now want a legal representative?

Answer: No"

[18] Warrant Officer Kambungu was asked what the accused's reply was after he was explained that he could apply for legal aid during his evidence in chief. No clear answer was given to this question. Warrant Officer Kombungu referred to his first appearance in the district court and the first time when the accused did not understand him properly. I pause here to mention that on the date of the interview, Warrant Officer Kombungu had personal knowledge that the accused indicated during the first interview that he would require the services of a legal representative at a later stage and that he had applied for legal aid.

[19] Inspector Simasiku testified in his evidence in chief that the accused indicated that he did not want any legal representation. In re-examination counsel for the State wanted to know from Inspector Simasiku what the accused's response was when his right to apply for legal aid was explained to him. He answered as follows: "*the accused … persisted (sic) that he does not want any legal representative or to make any application somewhere, but that he wanted to represent himself in his case."* This answer was clearly not consistent with the evidence adduced by the State that the accused had already applied for a legal representative to be appointed by the Directorate of Legal Aid. When this was pointed out to Inspector Simasiku he indicated that it is not really inconsistent because the accused is not well educated and the accused informed him that he does not want anyone from this Government to represent him in this case. When the Court asked him to clarify what he meant when he testified that the accused was not well educated, he informed the Court that he knew the accused well and to his knowledge the accused had only completed grade 8 (Standard 6). None of this conversation appears to have been translated to Warrant Kambungu who just recorded a simple "*no".* When Inspector Simasiku was asked why this was not recorded, he simply stated that he does not know why it was not recorded.

[20] Mr Hengari submitted that the fact that the accused was not informed that if he cannot afford to pay for a legal representative that one would on application be

appointed on his behalf, was fatal and the statement should not be admitted on this basis alone. I cannot agree with the submission made by Mr Hengari. In *S v Mbahapa*[4] an appellant raised the ground that a failure of justice occurred as his right to legal representation was not explained to him by the magistrate. It was held that in considering whether any failure of justice had occurred as a result of the magistrate's failure to inform the appellant of his right to legal representation, that it was reasonable to conclude from certain statements in the affidavit of the appellant's attorney filed in support of the application for condonation of the late noting of the appeal, that the appellant had been well aware of his right to legal representation. Even if I were to accept that the accused's right to apply for legal aid was not explained to him at the stage the warning statement was taken down, the evidence shows that the right to apply for legal aid was already explained to the accused by the magistrate on 8 March 2009. It was also evident that the accused understood his right given the fact that he in fact applied for legal aid.

[21] Warrant Officer Kombungu read the questions and answers appearing on the pro forma form into the record. During his evidence in chief whilst reading the questions and answers under the heading "complete the following only if the suspect/accused wishes to make a statement" he pointed out that there was a typographical error in that the last question should be numbered 7 instead of 1. I asked the witness if he could repeat the answer to question 4 and he indicated that it was no. Question 4 reads as follow: "Is this statement of (sic) answer made or given by your own free will" and the answer recorded was "no". At no time did he make any comment to explain this answer. During cross-examination the following question and answer were recorded:

> "Mr Hengari: Now why did you not … want to establish why the accused person says no in that instance?
>
> W/O Kambungu: Yes my lady, these questions were asked after the statement was read back to the deponent. And this question number 4, it could be an overview, from the author of from the deponent himself. I cannot explain on that. But even if I could realize it, there is no other way to destroy or to

[4] 1991 NR 274 (HC)

attempt to get another warning statement from the arrested person." [my emphasis]

[22] Not only was it recorded that the accused answer was "no" to the question whether he gave the statement of his own free will, but it transpires that these questions (I would assume questions 1 – 7) were asked after the statement was taken down and read back to the accused. These questions are designed to determine whether the accused is making the statement freely and voluntarily and this has to be determined at the outset, i.e before he makes the statement. He did not testify that he read the questions and answers back to the accused. Inspector Simasiku however testified that he heard "yes" when the accused answered and when Warrant Officer Kombungu read it back to him. It is conceivable that the accused could have said yes and that Detective Kombungu recorded no but I find it improbable that he would read the answer back as yes when he had recorded a "no". In this respect I find Warrant Officer Kombungu to be a credible witness who readily conceded that he cannot explain whether the accused said yes and he made a mistake or whether the accused with the assistance of the interpreter indeed said no which answer he then correctly recorded. He further could not explain why he did not enquire as he was supposed to do on hearing the answer given.

[23] Mr Shileka argued that the accused did not raise, as a ground, the fact that the accused did not make the statement freely and voluntarily and submitted that this was an opportunity which presented itself to the defense quite unexpectedly. The State bears the onus to prove beyond reasonable doubt that the accused made the warning statement freely and voluntarily. The Court has to be satisfied that the accused, at the time he was making the statement, did so freely and voluntarily. Although I appreciate that the issue of voluntariness was not raised as a ground, I wish to point out that the State was given the opportunity to deal with this issue during Warrant Officer Kombungu's evidence in Chief when the Court pointed it out. The fact that it was not raised as a ground does in any event not preclude the Court from excluding extra curial statements by an accused which was not given freely and voluntarily. The accused did not testify but as stated earlier, the State bears the onus. The evidential onus shifts only if the State adduced prima facie evidence that the statement was made freely and

voluntarily. The procedure adopted by the investigating officer was completely irregular He failed to determine whether the accused: decided to make the statement without being forced or unduly influenced, had sustained injuries; was sober; and understand the proceedings i.e the taking down of the warning statement, prior to taking down his was warning statement . The Court furthermore cannot ignore the possibility that the accused indeed responded "no" to the question posed to him. It is for these reasons that I am not satisfied that the State has discharged the onus to prove beyond reasonable doubt that the warning statement was made freely and voluntarily. It is, under these circumstances unnecessary to deal with the further arguments raised by counsel for the defense. I accordingly rule the warning statement to be inadmissible.

[24] Pointing Out – On 28 January 2009 the accused was referred to the Regional Crime Investigating Coordinator, Mr Burger to do a pointing out. He requested that a court interpreter be arranged and that the accused be taken for a medical examination. The accused was brought to his offices where the photographer as well as the interpreter was present. He introduced himself and recorded what the accused said on a pro forma form used for this purpose. This document was handed into evidence by agreement.

[25] The following information can be cleaned from the pro forma form: The investigating officer personally approach Chief Inspector Burger and informed him that the accused wished to point out a scene to him regarding the Caprivi High Treason case of 1998. The accused was informed of his right to remain silent, his right to consult a legal practitioner of his own choice and if he cannot afford a legal representative, one would be appointed by the State. The accused indicated that he understood the explanation. The accused was asked if he wanted a legal practitioner at that time and the accused replied: "at a later stage". He was informed that he was in the presence of a justice of peace. The accused was asked hereafter if he was still willing to point out the scene. The accused replied "*yes,* I am still willing to show you tomorrow – 29-01-2009*"*. The following question was put to the accused: "As you are still to continue with the pointing out, I want to know from you where you obtained the knowledge about that which you wish to point out." The accused responded as follow: "The Investigator requested

me to show the places to Botswana, to Zambia I passed". The accused, in response to a question whether he was assaulted, threatened or influenced by any person to make the pointing out, responded as follows: "No, I was only requested, nobody forced me". The interpreter, Mr Balumbu merely confirmed the evidence given by Mr Burger,

[26] The accused opted to remain silent and did not testify.

[27] Mr Hengari submitted in argument that the accused informed Chief Inspector Burger that he would want a legal practitioner at a later stage. He submitted that Mr Burger ought to have probed the accused to ascertain what he meant with "later" and should have stopped the pointing out on the basis of the accused's reply. He further argued that Mr Burger did not probe the accused after he informed him that he was requested to do the pointing out in order to satisfy himself that the accused was doing the pointing out without any undue influencing.

[28] Chief Inspector Burger was of the view that a request did not amount to undue influence. The response by the accused suggests that it was a mere request which he could have refused if he wanted to and that he was not forced to accede to the request. The accused did not testify to indicate what transpired at the time he was requested to do the pointing out. Although the Court heard evidence that the accused was unsophisticated, there was no indication on the pro-forma form that the accused was unduly influence when the request was made. Under these circumstances the Court cannot speculate that he was unduly influenced to accede to the request made or put differently: "The mere possibility of influence on the accused,…, does not automatically render the admission or pointing out inadmissible"[5]

[29] The issue of the failure by investigating team to inform Mr Burger and his failure to probe what the accused meant when he indicated that he would want to have a legal practitioner at a later stage, is dealt with hereunder.

[5] Hiemstra's Criminal Procedure at page 24 -69

[30] The Confession: The magistrate who took down the confession, Ms Sakala testified that the accused was brought to her on 6 February 2009 by Sgt Shigweda for her to take down his confession. She was assisted by an official interpreter, Mr Shwena Caster. She testified that she explained the accused's right to remain silent and his right to legal representation. To this end she used a form referred to as Annexure A to explain his right to legal representation and the right to apply for legal aid. This annexure however was not attached to the confession. The accused was explained that he has the right to obtain legal representation before making the statement and was asked whether he wanted to obtain legal representation as explained to him. He responded as follow: "*Not now but later in the proceedings".*

[31] Mr Hengari argued that the accused's right to legal aid was not explained. The magistrate in this case testified that she, as a rule, use an Annexure A to explain the right to apply for legal aid. She however could not recall that she had advised the accused at his first appearance that this was a serious matter and that he should apply for legal aid. The reason she gave for her inability to remember was that she deals with many cases on a daily basis and it would be difficult to single out one particular matter. It is for this reason that it is required of magistrate to accurately record proceedings in court. I, in the absence of a written record that the accused was informed of his right to apply for legal, cannot rely on the testimony of the magistrate who cannot, given the volume of matters she was handling, reasonably be expected to remember specific matters. Her evidence was however corroborated by the interpreter who was present at the time and no reason was advanced why the Court should not accept her evidence as credible. Furthermore, the accused, by this time, already knew of his right to apply for legal aid and had in fact applied. His right to consult with a legal representative of his own choice or with one appointed by the State was further explained by Chief Inspector Burger during the pointing out on 28 January 2009. I am satisfied that the accused made an informed decision when he opted to proceed without obtaining legal representation first. His reasons for having waived his right to legal representation are not known.

[32] Mr Hengari further submitted that the investigating team had a duty to inform the magistrate and Mr Burger that the accused had applied for legal aid and they had failed to do so. If I understand the argument correctly it means that if these witnesses were informed of the fact that the accused applied for legal aid, they should not have proceeded with the pointing out or taking down of the confession/statement under these circumstances. He referred me to S v KUKAME 2007 (2) NR 815 (HC) in support of this view. He cited the following extract from this case: "The right to have access to a lawyer is inextricably linked with the right not to be compelled to make a confession, which is one of the requirements for admissibility. By continuing with the interview and posing further questions which ultimately led thereto that the accused made a statement, a violation of the accused's constitutional rights occurred." The preceding sentences however shed more light on the peculiar facts of that case which reads as follow*:* "Once the accused was asked whether he wanted legal representation before making a statement and he answered in the affirmative, no further questions should have been put to him which may have led him to make any statement. The interview should have been stopped immediately, except perhaps to determine who the accused's lawyer is in order for arrangements to be A made for the lawyer to be contacted *(Compare S v Agnew 1996 (2) SACR 535 (C) at 542c)".* Van Niekerk J, at page 833 J – 134 A – C stated the following in the afore-said judgment: "Mr Dos Santos also took issue with the fact that accused was not specifically explained that he had a right to a lawyer, but I think the import of the two questions 'Do you have a lawyer?' and 'Do you want a lawyer?' is clear. By answering 'Not now', the accused clearly understood that he could have access to a lawyer if he wanted to. In his evidence he said that, although he knew that he had a general right to legal representation and specifically at the trial, he did not know that he needed a lawyer at the stage of the interview. This is something different to wanting a lawyer. The fact that he might have needed a lawyer is something he could only realise with hindsight, perhaps after having consulted with his lawyer. Even if Scott had expressly advised him of his right to legal representation he would not then have realised that he needed a lawyer. I agree with what was stated in S v Vumase 2000 (2) SACR 579 (W) at 581, namely that there is no duty on a policeman to advise an accused to obtain legal representation before making a statement.

In this matter the accused's answer both before the pointing out and before making the confession/statement cannot in any way be construed as being affirmative. I do not believe that the statement by the accused was unclear. The accused having been

informed that he had a right to consult with a legal representative before making the statement/confession and pointing out and having applied for legal aid, on the face of his recorded answers, clearly indicated that he would require the services of a legal representative at a later stage. The reasons for the accused to waive his right to consult with a legal representative before making the statement are unknown. I therefore conclude, on the evidence before me that the confession/statement and the pointing out was made freely and voluntarily. I further conclude that the accused was adequately informed, not only that he has a right to legal representation which include his right to legal aid, but also that he has a right to consult a legal representative before the pointing out and the right to obtain legal representation before making the statement/confession to the magistrate when he opted to proceed without a legal representative.

[33] The ruling on admissibility is interlocutory and maybe reviewed at the end of trial. I however need to specifically point out that I would revisit the issue of the admissibility of the pointing and the confession at the end of the trial insofar as it may have formed an integral part of the warning statement which has been ruled inadmissible.

[34] Mr Hengari cross-examined the magistrate extensively on the manner in which the content of the statement/confession was recorded. This is a dispute of fact i.e whether the accused made the statement/confession which the State wishes to tender into evidence, which dispute I shall adjudicate in the main trial.

[35] In the result the following ruling is made:

1. The oral admissions made by the accused to Inspector Hosea Ndjarya Shinane and his warning statement are declared inadmissible as evidence against him in the main trial.
2. The evidence of the pointing out done by accused and the confession/admission made by the accused to the magistrate is declared admissible as evidence against him in the main trial.

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Tommasi J